

In The

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Supreme Court of the United States

JOAK, JR., CLERK

October Term 1977

No. 77-451

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN, RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD, UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B. SETTLE, LEO WHITE, DANIEL DUBANIEWICZ, ADOLPH DONADEO, H.J. HUEMRICH and FRANCIS KEENAN, all as Trustees ad litem of THE WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL AND RESTAURANT EMPLOYEES PENSION FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN, RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
(Continued on Reverse)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIRD

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SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,  
NICHOLAS ALWINE, H.J. HUEMRICH and FRANCIS  
KEENAN, all as Trustees ad litem of the WESTERN  
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SUCCESSOR TO TRUSTEES OF THE HOTEL AND  
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TRUSTEES OF THE HOTEL AND RESTAURANT  
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION  
TRUST FUND, . . .

and

HOTEL AND RESTAURANT EMPLOYEES AND  
BARTENDERS INTERNATIONAL UNION WELFARE  
FUND,

and

INTERNATIONAL UNION PENSION FUND,

*Petitioners,*

vs.

JOHN J. KENNY,

*Respondent.*

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*Petitioners,*

vs.

JOHN J. KENNY,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 23, 1977.

## **OPINION BELOW**

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Western District of Pennsylvania appears in the Appendix hereto.

## **JURISDICTION**

The judgment of the Court of Appeals for the Third Circuit was entered on June 23, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## **QUESTIONS PRESENTED**

1. Whether Kenny's self-dealing constituted a major deviation from the standard of conduct for fiduciaries established by other Courts of Appeals?

2. Whether the decision below conflicts with the standards for the management of Pension Funds created by federal, statutory and case law?

3. Whether Kenny's contract is unenforceable as it is not supported by adequate consideration?

4. Whether Kenny's employment contract ended with the merger of the Local Funds with the International Funds.

## **STATUTORY PROVISIONS INVOLVED**

United States Code, Title 29:

“§186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations,

and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(c) The provisions of this section shall not be applicable

(5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents).

#### §1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

### **§1105 Liability for breach of co-fiduciary**

#### **Circumstances giving rise to liability**

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly, in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

### **§1106. Prohibited transactions**

(b) A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account.”



## STATEMENT OF THE CASE

### I. Introduction

The instant case is essentially an action for breach of an employment contract.

The action was commenced by filing of summons and complaint against certain of the defendants in the Court of Common Pleas of Allegheny County on December 2, 1974. Defendants, by petition for removal, filed January 8, 1975, removed the case to the United States District Court for the Western District of Pennsylvania. The answer set forth a counterclaim. Subsequently, plaintiff amended his complaint on or about February 13, 1975, May 30, 1975, and October 31, 1975. The principal purpose of the amendments was to clarify the identity of defendants and to add defendants.

On February 20, 1976, the court held a hearing on plaintiff's motion for summary judgment and defendants' cross motion for summary judgment. Both motions were denied. On March 1, 1976, a non-jury trial before Chief District Judge Herbert P. Sorg was begun. The trial continued for three days and was concluded on March 3, 1976. At the conclusion of the trial, the complaint was dismissed as to defendants William Meyers and William Meyers Company, Inc. upon motion of defendants.

By judgment and order dated August 2, 1976, Chief Judge Sorg found defendants liable on the employment contract for part of the damages requested. Defendants respectfully appeal from the findings and conclusions of the District Court.

By judgment and order dated June 23, 1977 the Third Circuit Court of Appeals affirmed the decision of Chief Judge Sorg.

## II. Facts

### A. THE PARTIES

Plaintiff, John Kenny, was President of the Hotel and Restaurant Employees Alliance, Local 237 (Local 237), a labor union affiliated with the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (International Union) from 1941 through 1973.

Defendants, Hotel and Restaurant Employees Alliance, Local 237 Welfare Fund and the Hotel and Restaurant Employees Alliance Local 237 Pension Fund (cumulatively referred to as the Local 237 Funds) were jointly administered multi-employer, employee benefit trust funds which operated for the benefit of employees of employers which, pursuant to collective bargaining agreements with Local 237, made contributions to said funds on behalf of their employees. Defendants, Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Union Welfare Fund and the Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Union Pension Fund (cumulatively referred to as the Western Pa. Funds) were formed as a result of a merger between the Local 237 Funds and those associated with another local of the International Union — Local 188 — and were jointly administered multi-employer labor-management employee benefit trust funds. The named individual defendants were trustees of the Local 237 Funds or of the Western Pa. Funds.

The Hotel and Restaurant Employees and Bartenders International Union Welfare Fund and the Hotel and Restaurant Employees and Bartenders International Union Pension Fund (cumulatively referred to as the International Funds) are jointly administered multi-employer labor-management employee benefit trust funds. Effective April 1, 1975, the Western Pa. Welfare Fund merged into the International Welfare Fund and the Western Pa. Pension Fund

merged into the International Pension Fund. Consequently, responsibility for administration of the assets and benefit plans of the Western Pa. Funds has been transferred to the trustees of the International Funds. (The principal facts set forth above are contained in a pre-trial stipulation between the parties.)

From the inception of the Local 237 Funds, the plaintiff, John Kenny, served as a trustee and as chairman of the board of trustees. He served as chairman until October 25, 1973, and as a trustee until March 4, 1974. From the beginning, plaintiff acted in the capacity of fund administrator, supervising fund employees, making day to day decisions regarding the operation of the funds and dealing with various third parties such as the funds' actuary, accountant, attorney and insurance company. Until May 1, 1973, plaintiff received no compensation for these services which occupied only a small portion of his time. Through May 1, 1973, plaintiff was paid a salary for his position as Union President which occupied the bulk of his time.

Since 1964, when he was 64 years old, plaintiff has suffered from a number of serious illnesses. In 1967 he required a long term leave of absence of a number of months' duration for health purposes. In 1971 and 1972, plaintiff had two serious heart attacks, each requiring lengthy periods of recuperation. From 1968 the plaintiff regularly told other local union officials of his intention to resign "and turn the Union over to them." From 1968 on, Kenny mentioned to other union officials that "he (Kenny) wanted to take over the Pension and Welfare Funds." Having learned of a written contract between a St. Louis local fund and its director, Kenny had often suggested that someone send for a copy.

## **B. JOHN KENNY AND THE EMPLOYMENT CONTRACT**

At a trustees meeting of the Local 237 Welfare Fund and the Local 237 Pension Fund on July 13, 1971, Kenny was offered employment as Director of the Funds. The resolution of

the trustees did not provide for a salary. The trustees made no offer regarding the terms of such employment and did not request that a written contract of employment be prepared. Nevertheless, at the instance of the plaintiff, the Fund attorney, Herman Lipsitz, drafted a full employment contract with extensive wage and fringe benefit provisions, a term of five years renewal at plaintiff's sole option for another five years and providing that he is not subject to "discharge or removal" unless he so agrees. The original contract provides that Kenny devote his full time and effort to his duties.

As Union President, Kenny had been receiving a salary of \$14,000 per year. By taking over as Director of the Funds he received a salary of \$18,000 per year. The wage increase in the first year of the contract amounted to a 30% increase to Kenny over what he had been earning as Union President.

At the meeting of trustees, on October 21, 1971, the written contract which had been prepared by Fund attorney Lipsitz, was presented to the trustees with the request that they approve same. The trustees did not request or authorize the drafting of the written document; they did not previously make any specific offer, proposal or agreement regarding the terms and conditions of Kenny's employment. There was no arm's length negotiation. There were no private discussions between the Fund attorney and the defendant trustees concerning the employment terms that Kenny would enjoy as Director of Funds. Rather, the record evidence yields the conclusion, that the written contract of employment, upon which plaintiff relies in this action, was wholly and totally a product of the plaintiff and the Fund attorney. Kenny obtained a copy of a contract between Howard McVey and the St. Louis Welfare Funds used it as a model and unilaterally decided what the contract terms would be. In essence, Kenny, as chairman of the trustees alone decided what Kenny, the Fund Director would be earning, and what his terms and conditions of employment would be.

At the next trustees meeting, held March 14, 1972, the only restrictive clause in the contract, that requiring Kenny to devote full time and effort to the funds, was deleted. The resolution adopted at Kenny's request reduced his obligation such that he would now be required to devote only so much time as Kenny himself deemed necessary. The resolution was again reduced to a formal written document by the Fund attorney which was presented at the meeting of the trustees on June 4, 1972 for their signatures.

Apparently to give it greater authority, Kenny's written employment contract was presented to the trustees by attorney Lipsitz as being similar to the St. Louis contract. (The trustees were not specifically told that the contract derived from the St. Louis funds.) The trustees were not however, advised of the many differences. In fact, a comparison between the Kenny and McVey situations yields the conclusion that except for the economic terms, every other aspect of the employment relationship differed. Thus, McVey, the St. Louis fund director, was a local union business agent in 1951 when the St. Louis fund trustees asked him to be Director of the Welfare Fund. He was not then and never has been a trustee. When he accepted the job he resigned his union position. He came to work every day from 9:00 a.m. to 4:00 p.m. with defined duties and responsibilities. He could be discharged by the trustees for misfeasance, malfeasance or nonfeasance. Kenny on the other hand had been Local 237 President and Chairman of Trustees of the Local Funds. Under the final version of the written contract he was not obligated to devote any particular amount of time or effort to his job as Director of the Funds; he could not be fired under the written agreement; he continued to function as Union President for a time after he assumed the fund position and continued as a trustee. Kenny's employment contract failed to establish standards of performance and attempted to emasculate the trustees by divesting them of supervisory authority over the Funds.



The economic terms of the McVey contract constituted compensation for the full time job which McVey performed; Kenny, on the other hand, took the same economic benefits for a part time job that he had previously done without compensation incidental to his principal job of Union President. The Fund job as performed by Kenny over the years required only a minimal effort and he did not intend to do any more upon assuming the Director's position.

As a result of Kenny's concerns regarding the legality of his contract, he did not assume the title of Director of the Funds until May 1, 1973. At that time he stopped receiving salary as Local 237 President although he continued to function as Local 237 President until his resignation on September 7, 1973. As a result of Kenny's actions, during the period May 1, 1973 through September 7, 1973, the Local 237 Funds were giving illegal financial support to Local 237 by paying the salary of its President.

On September 7, 1973, Kenny submitted a letter resigning his position as Union President. The letter, supported by a letter from his cardiologist, indicated that Kenny was too sick to continue his union duties.

### C. THE MEYERS STUDY

In late spring of 1973, defendant, Sanfilippo, and another official of Local 237 were at International Union headquarters in Cincinnati to discuss union business with International officials. At that time Sanfilippo made some complaints about how the Local 237 Funds were being run. International President Hanley offered to send an expert on union-management employee benefit trust funds to Pittsburgh to make a study of the Local 237 Funds. The expert, William L. Meyers, went to Pittsburgh shortly thereafter and met with various fund officials including Kenny and with the fund employees.

Meyers thereafter rendered a lengthy report. His findings were presented to a meeting of the trustees on December 13, 1973. Meyers testified at the trial both as an eyewitness and as an expert witness concerning his observations and conclusions with respect to the administration of the Local 237 Funds in 1973 under the leadership of plaintiff Kenny. Contrary to the findings of the District Court, Meyers' testimony consisted of detailed and far reaching criticism of Kenny's administration of the funds; his testimony was not challenged by the plaintiff and stands unrebutted on the record. Meyers' observations and conclusions were reinforced by the testimony of witnesses Virginia Neky, Marie Urban, Louis Sanfilippos and Robert Kern. A summary of Meyers' critical observations of Kenny's administration follows (*each item of criticism of which Meyers testified had been previously set forth in his report and had been reported to the trustees*):

a) The fund investment policy of holding monies in numerous passbook savings accounts (*by 1973 over \$5 million was held in 140 banks around the country*) was dangerous in that security over the money and passbooks was poor and it was improvident since the funds could have been earning higher interest. Meyers testified that the funds may have lost hundreds of thousands of dollars in investment income. Moreover, the passbooks were kept in Virginia Neky's desk drawer with no security. It is impossible to determine whether all passbooks were found when the monies were consolidated by the Pittsburgh National Bank.

b) The fund office was in the same physical location as the union office which caused great confusion and yielded poor administration. Fund personnel were used to perform union duties. See also testimony of Robert Kern and Virginia Neky. Robert Kern testified that while being paid as a full time employee of the Local 237 Funds he was used by Kenny to perform union business agent work for more than 50% of his time.



c) There was very poor document security which makes it very easy for unauthorized people to gain access to and tamper with fund records.

d) There was a defective system for eligibility determination. Due to the condition of records, it was often impossible to make a determination of the eligibility of a claimant without resorting to telephone verification which was not followed up and could not be audited. Employer reports were incomplete and were not promptly posted and balanced. Contributions were not promptly deposited.

e) The Local 237 Funds were used as an instrument of union policy. Claimants who were eligible were denied benefits unless their union dues were paid up while benefits were granted to some union members who were not eligible. These instructions would come either directly from Kenny or from someone acting on Kenny's behalf. Eligibility rules which were made by trustees were sometimes disregarded by Kenny who would decide to pay a claim or refuse to pay for personal or union reasons.

f) Procedures for collection of money owed to the funds by contributing employers were inadequate since the fund administration did not know whether and to what extent an employer was delinquent. In addition, employer contributions were never audited and therefore employers were not held accountable for failing to make contributions for all employees.

g) There was comingling of monies between Pension Fund and Welfare Fund such that it was difficult to determine where certain assets belonged.

*Meyer concluded that the Local 237 Fund office under Kenny was among the worst he had ever seen.*

Virginia Neky, who had managed the Local 237 Pension

Fund under Kenny's administration testified that some employers did not render reports to the funds and that Kenny did nothing to get the reports. During the period April, 1973 to April, 1974, Kenny came to the office infrequently and then only in the mid to late afternoon. When he did come to the office, the majority of his time was spent on union rather than fund business. Although Virginia Neky was a Local 237 Pension Fund employee, she did union work as well.

The assets of the Local 237 Pension Fund were held in over 100 passbook savings accounts and the passbooks were kept in her desk drawer despite the fact that several passbooks were known to have been lost in 1964 or 1965 and the office was in a state of confusion.

Marie Urban, who had been a Local 237 Welfare Fund employee under Kenny's administration testified that one of her jobs was to check whether the dues of a benefit applicant were paid up before the claim would be paid.

Kenny authorized payment of claims for union members who were not eligible for benefits. During the last year (*i.e.*, while he was the paid Director of the Funds) Kenny came to the office very infrequently and stayed only for short times.

Witness Louis Sanfilippo, who was a Local 237 business agent under Kenny and who became union president after Kenny resigned, testified that after May, 1973 when Kenny transferred to the Local 237 Fund payroll, he rarely came to the Fund office. Kenny would meet with union officials afternoons at the Carlton House Hotel. These meetings were generally to discuss union business. Trustees learned of Kenny's poor administrative procedure from Meyers, who also gave advice as to how to better operate the funds.

Robert Kern, who had been a Local 237 Welfare Fund employee under Kenny's administration, spent the bulk of his

time doing union business rather than on fund business. He further testified that Kenny gave him his union assignments; Kenny came into the office rarely. During the year May, 1973 to May, 1974, Kern had only five or six conversations with Kenny on fund business although they had many on union business and most of these took place at the Carlton House.

The trustees upon being advised as to how poorly the fund was being administered requested that William Meyers undertake certain administrative responsibilities to correct the problems. The trustees authorized the marshalling of the assets of the funds, retained a bank to act as their agent and obtained professional investment advice. Meyers was instructed to set up a new office, separate from the union office and to institute proper recordkeeping and controls for handling money and claims (see minutes of trustees' meetings).

Although Kenny could have performed duties within this new framework, *he did not*. The record indicates that once Mr. Meyers was retained, Kenny did even less work for the Funds than previously. *Meyers concluded that Kenny was not in evidence and contributed nothing administratively to the Funds.* As a result of Kenny's non-performance on behalf of the Funds, he was discharged and his salary discontinued at a meeting of the trustees of August 19, 1974. Kenny was informed on the following day.

#### D. THE INTERNATIONAL FUNDS

The International Funds which had been established for the purpose of merging and consolidating local funds of the Hotel & Restaurant Employees and Bartenders International Union accepted the merger of the Western Pa. Funds effective April 1, 1975. The International Funds, at the time of trial were administering benefit plans of 22 local welfare funds and 13 local pension funds; had assets of approximately \$9 million in the welfare fund and \$50 million in the pension fund with

approximately 50,000 participants. There are nine union and nine employer trustees from all over the country. Fund administration is aided by computerized recordkeeping centralized in Chicago while local offices are located in various cities such as Pittsburgh. Fund assets are handled by the Harris Trust and Savings Bank of Chicago which acts as corporate trustee and investment advisor.

## REASONS FOR GRANTING THE WRIT

### I.

#### **KENNY'S SELF-DEALING CONSTITUTED A MAJOR DEVIATION FROM THE STANDARD OF CONDUCT FOR FIDUCIARIES ESTABLISHED BY OTHER COURTS OF APPEALS.**

Approximately 50 years ago, the Honorable Benjamin Cardozo, then Chief Judge of the New York State Court of Appeals set out the standard of behavior for an individual with fiduciary responsibilities. The normal ethics of the business world would not suffice, rather *"A Trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.* As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitions to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, *Wendt v. Fischer*, 243 N.Y. 439, 444. *Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court.*" (emphasis supplied). *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

In the ensuing years, the courts have clearly and

unequivocally stated that this standard would be maintained. Thus, two years ago, the Second Circuit Court of Appeals stated that trustees would be held to the "highest level of responsibility and care in their management of the trust property." *Morrissey v. Segal*, 526 F.2d 121, 126 (2nd Cir. 1975). See also *Lamb v. Carey*, 498 F.2d 789 (D.C. Cir. 1974), *cert denied*, *Carey v. Davis*, 419 U.S. 869 (1975); *Lewis v. Mill Ridge Coals*, 298 F.2d 552, 558 (6th Cir. 1962).

This high standard places a duty on the trustee to administer a trust "solely in the interest of the beneficiary." *Second Restatement of the Law of Trusts*, §170. The fiduciary or trustee is under "a duty not to profit at the expense of the other . . . If the fiduciary enters into a transaction with the other and . . . if the transaction is unfair to the other, the transaction can be set aside by the other." Comment, *Second Restatement of the Law of Trusts*, §2. See also *Bogert on Trust*, 2d Ed., §543;

These basic principles set a background for an examination of John Kenny's conduct. For years, Kenny was a leader of hotel and restaurant workers in their fight for improved working conditions and wages. Indeed, Kenny was the President of the Hotel and Restaurant Employees Alliance, Local 237 for 30 years.

More importantly, Kenny was the moving force behind the creation of the trust funds at issue. From the onset, he served as Chairman of the Board of Trustees of the Funds. As a practical matter, Kenny ran the operation of the funds in addition to his full time position as Union President.

By 1971, Kenny was interested in another position; a position not yet in existence; that of Director of the Funds. This position he started on May 1, 1973. At that time Kenny was 70 years old and in poor health. In each of the two previous years he had had serious heart attacks requiring lengthy periods of recuperation.



Nevertheless, Kenny wanted a five year term as Director and an option for a second five years at his discretion.

This contract for an already sick and elderly man, provided that he could not be discharged without his approval. The contract specified no hours of employment, no specific tasks to be performed, and no standard to measure the Director's work. All these were within the discretion of the Director himself. It appears that, in fact, Kenny performed no more tasks as the paid Director than he had previously performed without compensation. It should also be noted that Kenny's salary of \$18,000 constituted a \$4,000 raise over his position as Union President.

Thus, the Chairman of the Board of Trustees negotiated a well-paid position for himself requiring no more work than he had previously performed for no compensation and which could not be reviewed by anyone other than himself.

While negotiating this one-sided employment contract, Chairman of the Board of Trustees Kenny was under the duty to act according to the highest moral standards and to refrain from improper self-dealing. Nevertheless, he created for himself a highly paid position which would place no strain on a sick and elderly man. Indeed, Kenny's employment contract could more accurately be described as Kenny's personal pension plan. It can hardly be argued that Kenny did not violate the prohibition on using his fiduciary position as Chairman of the Board of Trustees to benefit himself. See *e.g.*, *Fruehauf's Estate v. CIR*, 427 F.2d 80 (6th Cir. 1970).

As a result, Kenny's conduct raises the question of whether the high standard of behavior previously demanded of fiduciaries is being diluted. It is to the Supreme Court now to answer that question with a resounding no.

## II.

**THE DECISION BELOW CONFLICTS WITH THE STANDARDS FOR THE MANAGEMENT OF PENSION FUNDS CREATED BY FEDERAL STATUTORY AND CASE LAW.**

As discussed previously, Kenny arranged for himself an extraordinarily favorable contract. He negotiated this contract while Chairman of the Board of Trustees of the Pension Funds.

This conduct did not just violate the general standard required of fiduciaries. His self-dealing violated specific prohibitions established by statute and case law.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1104(a)(1) requires a fiduciary discharge his duties "solely in the interest of the participants and beneficiaries and. . . (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims."

Unless it can be said that a prudent Chairman of the Board of Trustees of a pension and welfare fund would hire as Director of those funds a sick, elderly man with a renewable five year contract which left the performance standards completely within the employee's discretion, then the Chairman violated his statutory obligations when he hired himself as Director.

Similarly, Section 1106(b) of the Act states that a fiduciary shall not: "(i) deal with the assets of the plan in his own interest or for his own account."

Yet, here, the fiduciary Kenny arranged for the plan to hire him at terms which could only be characterized as in Kenny's own interest and for Kenny's own account.



And Section 1105 makes the other trustees responsible for remedying Kenny's breach of his fiduciary responsibilities.

Kenny's clear violations of the provisions of ERISA would make his contract void on January 1, 1975 when the Act became effective.

In addition, the Taft-Hartley Act limits the use of employee trust funds to the "exclusive benefits of the employees of such employer, and their families and dependents." 29 U.S.C. §186(c)(5). Thus, use of trust funds for the benefit of the union has been specifically prohibited. See *United States v. Saniago*, 528 F.2d 1130 (2nd Cir. 1976), *cert. denied*, 96 S. Ct. 2169 (1976); *Poston v. Caraken*, 378 F.2d 439 (5th Cir. 1967). Indeed one court required separation of the union and trust fund officers, facilities, and so on. *American Bakeries v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958), *aff'd.*, 285 F.2d 426 (6th Cir. 1960).

Here, however, the fund and union offices were in the same location. More importantly, Kenny during the period he was paid as a full-time Director of the trust funds, the bulk of the limited time he was actually in the office was spent on union business. Two other employees of the Pension Fund, Virginia Neky and Robert Kern, performed union business under the direction of Kenny. This conduct clearly constituted violations of governing law and placed an affirmative obligation on the other trustees to remove Kenny.

Finally, in a case where the United States Government held monies in trust for certain Indian tribes, the Court of Claims held that the government violated its fiduciary obligations by failing to invest the monies in the highest paying prudent investment available. *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 512 Fed. 1390, 1395 (Ct. of Clms. 1975). The trust funds managed by Kenny were scattered in banks throughout the country. Aside from the possibility of losing track of some of

these funds, this practice also resulted in lower interest payments than would have been possible if the funds were consolidated. Once again, Kenny was clearly breaching his obligations as a fiduciary and as Director.

The apparent failure by the District Court and the Court of Appeals in the instant case to recognize Kenny's serious and continual breaches of his fiduciary responsibilities constitutes a major departure from the exacting standards applied to other fiduciaries by the other Circuit Courts of Appeals. This departure by the Third Circuit raises serious questions as to the continuing viability of previous decisions concerning a trustee's responsibilities. It is the Supreme Court which should now establish the standard of behavior required by ERISA.

### III.

#### **KENNY'S CONTRACT IS UNENFORCEABLE AS IT IS NOT SUPPORTED BY ADEQUATE CONSIDERATION.**

It is a basic principle of contract law that a contract, to be enforceable, must be supported by consideration. See *Byerby v. Duke Power Co.*, 217 F.2d 803 (4th Cir. 1959); *Abbott v. Arkansas Utilities Co.*, 165 F.2d 339 (8th Cir. 1948). —

The consideration flowing from the trust funds is clear: \$18,000 a year for 5 years, an option to renew, \$16,500 severance pay and a variety of valuable fringe benefits. Not so clear, however, is the consideration flowing from Kenny. He did not promise to work any specified number of hours, he did not promise to perform any specific tasks, he did not promise to be held to any standard of conduct. In short, he could come and go as he pleased, and do as he pleased. It should be noted that the proposed contract required Kenny to devote his full time and effort to his position as Director. This was changed to require him to devote as much time as Kenny himself considered necessary. Thus, Kenny could have decided that it was not

necessary for him to devote any time to his position; Kenny could literally have never showed up as Director and have complied with the requirements of his contract. Nor could anyone have challenged a decision by Kenny not to perform any services. His performance was not subject to any standard of review. The contract specifically provided that Kenny could not be discharged unless Kenny himself agreed to the discharge.

Thus, Kenny promised to do no more than he wanted to do. This included the right to do absolutely nothing for the trust funds. A party to a contract who has not obligated himself to do anything has simply not rendered any consideration. *TMA Fund Inc. v. Biever*, 380 F. Supp. 1248 (E.D. Pa. 1974), *appeal dismissed*, 520 F.2d 639 (3 Cir. 1975).

Further, it appears that Kenny's part of the contract may not even constitute a promise. According to the Comment (b) to Section 2 of the *Restatement of the Law of Contracts*, "an apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise." See also §79 of the *Restatement of the Law of Contracts*.

Nor could Kenny's conduct constitute consideration. Kenny rarely went to the trust office. On those occasions he apparently stayed only a short time and even then, most of his time was spent on union business and not on the administration of the Fund. This lack of direction resulted in a very poorly run Fund. The Fund lost hundreds of thousands of dollars in possible earnings because it had its money scattered in small bank accounts all over the country. Security over the passbooks was virtually nonexistent. It is not possible to determine whether the Fund was subsequently able to recover all those monies or whether there are additional accounts from which the monies were lost or stolen. Inadequate efforts were made to determine whether employer contributions were complete and up to date.

Funds were used to further union policies. This misuse included the improper determinations of benefit eligibility and the improper use of Fund employees to perform union business.

In sum, it appears that Kenny did no more than he promised to do: nothing.

Perhaps the best indication of the lack of consideration flowing from Kenny is to ask what conduct or lack of conduct by Kenny would have constituted a breach of his illusory promise.

#### IV.

#### **KENNY'S EMPLOYMENT CONTRACT ENDED WITH THE MERGER OF THE LOCAL FUNDS WITH THE INTERNATIONAL FUNDS.**

Effective April 1, 1975 the Local 237 Funds merged into the Welfare and Pension Funds of the International Union. The District Court found the transfer was proper and conducted in the interest of the beneficiaries of the Fund.

The International Union had no contract with Kenny. There is no successorship clause in Kenny's contract. As a result, Kenny's rights, if any, ended with the merger of the Funds. There is no basis to find a continuity of enterprise in the Funds.

This Court has recognized the difficulty of resolving successorship problems in contrasts. As a result, the principles have been developed on a case by case basis.

This much is clear, however: a new employer has the right to hire former employees. This was established in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and reaffirmed in *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974).

Nor is *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543 (1964) to the contrary. *Wiley* simply provides for the successorship of an arbitration clause.

Since the trustees of the International Funds would have had a right to discharge Kenny had he still been employed at the time of the merger on April 1, 1975, Kenny's damages, if any, must be cut off at that date.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

s/ Robert J. Mozer  
MOZER & GULMI, P.C.  
*Attorney for Petitioners*

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**APPENDIX**

**OPINION OF COURT OF APPEALS**

**UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

NOS. 76-2475 and 76-2476

**JOHN J. KENNY,**

*Appellant in No. 76-2475*

v.

**LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
HOWARD, UMBERTO GUIDOTTI, ARTHUR  
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.  
SETTLE, LEO WHITE, DANIEL DUBANEWICZ, ADOLPH  
DONADEO, H.J. HUEMRICH and FRANCIS KEENAN, all  
as Trustees ad litem of THE WESTERN PENNSYLVANIA  
HOTEL, CLUB, MOTEL AND RESTAURANT  
EMPLOYEES PENSION FUND, and/or SUCCESSOR TO  
TRUSTEES OF THE HOTEL AND RESTAURANT  
EMPLOYEES ALLIANCE LOCAL UNION 237  
INSURANCE AND WELFARE TRUST FUND AND  
TRUSTEES OF THE HOTEL AND RESTAURANT  
EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION  
TRUST FUND,**

**and**

**LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
HOWARD, UMBERTO GUIDOTTO, ARTHUR  
TATANGELO, GORDON FLAGG, FRANK GLANDI, W.B.**



*Opinion of the Court of Appeals*

SETTLE, LEO WHITE, DANIEL DUBANEIWICZ, NICHOLAS ALWINE, H.J. HUMERICK and FRANCIS KEENAN, all as Trustees ad litem of the WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL AND RESTAURANT EMPLOYEES WELFARE FUND, (and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND),

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION WELFARE FUND, AND WILLIAM L. MEYERS,

and

INTERNATIONAL UNION PENSION FUND,  
Louis Sanfilippo, et al., Appellants in No. 76-2476

*On Appeal from the United States District Court for the  
Western District of Pennsylvania*

*Civil No. 75-40*

Argued June 14, 1977

Before: ADAMS, VAN DUSEN and GIBBONS; *Circuit Judges.*

After consideration of the contentions raised by appellant,  
it is



*Opinion of the Court of Appeals*

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THE COURT,

s/A.M. Adams  
Circuit Judge

ATTEST:

s/Thomas F. Quinn  
Thomas F. Quinn  
Clerk

DATED: June 23, 1977

**OPINION OF DISTRICT COURT**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA**

**JOHN J. KENNY,**

**Plaintiff,**

**v.**

**LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
HOWARD, UMBERTO GUIDOTTI, ARTHUR  
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.  
SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,  
ADOLPH DONADEO, H.J. HUENRICH and FRANCIS  
KEENAN, all as Trustees ad litem of THE WESTERN  
PENNSYLVANIA HOTEL, CLUB, MOTEL AND  
RESTAURANT EMPLOYEES PENSION FUND, and/or**

*Opinion of District Court*

SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN, RENALD ROSSA, JOSEPH CICARDINI, NORMAN HOWARD, UMBERTO GUIDOTTI, ARTHUR TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B. SETTLE, LEO WHITE, DANIEL DUBANIEWICZ, NICHOLAS ALWINE, H.J. HUENRICH and FRANCIS KEENAN, all as Trustees ad litem of the WESTERN PENNSYLVANIA HOTEL, CLUB, MOTEL AND RESTAURANT EMPLOYEES WELFARE FUND, and/or SUCCESSOR TO TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 INSURANCE AND WELFARE TRUST FUND AND TRUSTEES OF THE HOTEL AND RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION 237 PENSION TRUST FUND,

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION WELFARE FUND,

and

INTERNATIONAL UNION PENSION FUND,

Defendants,

Civil Action No. 75-40

*Opinion of District Court*

The above entitled action, tried to this court without a jury, was commenced by the plaintiff, John J. Kenny, in the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, to recover damages for the wrongful termination by the defendants of his employment as Chairman of the Board of Trustees and Director of the Hotel and Restaurant Employees Alliance Local Union 237 Pension Trust Fund and Welfare Trust Fund (Local 237 Trust Funds), which funds were accumulated largely through the efforts of Mr. Kenny as President of Local 237.

The defendants, trustees of the Western Pennsylvania Hotel, Club, Motel and Restaurant Employees Pension Fund and Welfare Fund (Western Pennsylvania Trust Funds) and the Hotel and Restaurant Employees and Bartenders International Union Pension Fund and Welfare Fund (International Trust Funds), removed the action to this court pursuant to 28 U.S.C.A. §1441(a)<sup>1</sup> and 29 U.S.C.A. §1001 *et seq.*,<sup>2</sup> applicable to employee welfare and pension benefit plans, and asserted a counterclaim for compensation paid to the plaintiff between May 1, 1973 and August 31, 1974.

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1. 28 U.S.C.A. §1441(a) provides:

"... any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

2. 29 U.S.C.A. §1132(e)(1) provides:

"... the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary."

*Opinion of District Court*

## FINDINGS OF FACT

From the inception of the Local 237 Trust Funds, two funds administered by boards of trustees of identical composition, John J. Kenny acted as unsalaried chairman of both boards of trustees in addition to performing his duties as President of Local 237, an elected post for which he received compensation.

Pursuant to declaration of trust,<sup>3</sup> on October 21, 1971; the trustees of the Local 237 Trust Funds signed a formal contract of employment which named John J. Kenny as Chairman of the Board of Trustees and Director of the Local 237 Trust Funds. On May 1, 1973, Mr. Kenny accepted the terms of the contract as amended June 14, 1972, agreeing to devote whatever time he felt was necessary in the performance of his duties and accepting compensation of \$18,000.00 per year, subject to a yearly increase of ten percent during the term of the contract or any renewal thereof. The trustees agreed to reimburse Mr. Kenny for expenses incurred in supervising the Funds and in operating the automobile with which he was to be provided.

Under the terms of the contract, Mr. Kenny was not subject to discharge and, upon termination of his employment, was entitled to severance pay in the amount of \$16,500.00. The contract could be renewed at his option for an additional five years under the same terms and conditions.

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3. The Agreement and Declaration of Trust of the Local 237 Trust Funds, as amended, provided:

"Section 5. — Compensation —

No Trustee shall receive any compensation for the services rendered by him as Trustee. However, in those instances wherein the Trustee is also designated to act in a dual capacity as Director of the Fund, compensation shall be permitted to be paid to said Trustee in the capacity as Director.

*Opinion of District Court*

After May 1, 1973, Mr. Kenny did not receive compensation as President of Local 237 and, on September 7, 1973, he resigned that position.

In September, 1973, William L. Meyers Co., with the approval of the trustees, conducted a study of the administration of the Local 237 Trust Funds and submitted a report, dated October 5, 1973, which contained suggestions for the Funds' improved efficiency. Mr. Meyers found no improprieties in the administration of the Trust Funds.

In March, 1974, Local 237 merged with the Bartenders Local Union 188 to form Local 57 Western Pennsylvania Hotel, Club, Motel and Restaurant Employees and Bartenders Union, and direction and control of the assets of the Local 237 Trust Funds were transferred to the trustees of the Western Pennsylvania Trust Funds. On March 7, 1974, the trustees voted to remove Mr. Kenny from the board of trustees and to hire William L. Meyers Co. as administrator of the Trust Funds. Mr. Kenny continued to receive his salary as Director of the newly-named Trust Funds until August 19, 1974, when the trustees voted to discontinue his salary. During his employment, Mr. Kenny received \$24,600.00 under the terms of the contract and continues to have possession and use of an automobile owned by the Trust Funds.

On April 1, 1975, the Western Pennsylvania Trust Funds were merged with the International Trust Funds. There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence required by statute.<sup>4</sup>

Although the defendants contend that Mr. Kenny was

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4. 29 U.S.C.A. §1104

*Opinion of District Court*

unwilling or unable to perform his duties as Director of the Trust Funds and that he was therefore terminated for just cause, the report of the study conducted by the William L. Meyers Co. does not establish that Mr. Kenny's performance was unsatisfactory. Mr. Meyers further dispelled any such inference by his testimony that the recommended improvements could have been implemented under Mr. Kenny's administration.

That the court finds no evidence to support the contention that Mr. Kenny used improper means to secure the contract or that the compensation provided in exchange for his services was not reasonable.

**CONCLUSIONS OF LAW**

The court has jurisdiction over the persons and subject matter of this action pursuant to 28 U.S.C.A. §1441(a).

The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. §1001 *et seq.* Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract. The subsequent transfer of the Trust Funds does not cure the breach.

The measure of damages recoverable by an employee for the breach of an employment contract for a specific term is:

“ . . . the amount of his salary for the unexpired term less any sums which he has earned following his discharge and which he may thereafter earn during the unexpired term of the contract.”

*Russell v. Barnes Foundation*, 52 F. Supp. 827, 830 (E.D. Pa. 1943), *aff'd* 143 F.2d 871 (3d Cir.), *cert. denied* 323 U.S. 771



*Opinion of District Court*

(1944), citing *Pierce v. Tennessee Coal, Iron and Railroad Company*, 173 U.S. 1 (1899).

In view of Mr. Kenny's limited formal education (four years of elementary school), his 73 years of age, and the fact that he has sustained two severe heart attacks in recent years, (Tr. 97-100), it is not likely that he would find employment elsewhere. It is therefore concluded that, as to the first five-year period of the contract, Mr. Kenny may recover \$128,290.30, the sum of the following: \$67,468.00, the compensation which he would have received to date, and \$16,500.00, severance pay under the terms of the contract, plus \$44,322.30, compensation for the remaining twenty-one months of the five-year term. Future losses are not reduced to present worth because it is believed that the differential is off-set by non-inclusion of interest on plaintiff's losses to date.

The above considerations, in addition to those contained in Mr. Kenny's motion for advancement of the trial date,<sup>5</sup> lead this court to conclude that it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term.

The defendants' counterclaim for salary paid under the terms of the contract until May, 1973, will be denied.

An appropriate Order will be entered.

s/ Herbert P. Sorg

C.D.J.

Dated: August 2, 1976

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5. The plaintiff's Motion to Advance Trial, granted on January 1, 1976, set forth the following:

7. Plaintiff is 74 years of age, is suffering from hypertension and heart ailment necessitating constant cardiological care and requiring that he avoid stress. Delay in the within trial may aggravate his ailments, as counsel for plaintiff is advised by Dr. Julian Levinson, plaintiff's physician.

Supreme Court, U. S.

FILED

OCT 11 1977

MICHAEL R. BODAK, JR., CLERK

In The

**Supreme Court of the United States**

October Term 1977

No. 77 - 451

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
HOWARD, UMBERTO GUIDOTTI, ARTHUR  
TATANGELO, GORDON FLAGG, FRANK BLANDI, W.B.  
SETTLE, LEO WHITE, DANIEL DUBANIEWICZ,  
ADOLPH DONADEO, H.J. HUEMRICH and FRANCIS  
KEENAN, all as Trustees ad litem of THE WESTERN  
PENNSYLVANIA HOTEL, CLUB, MOTEL AND  
RESTAURANT EMPLOYEES PENSION FUND, and/or  
SUCCESSOR TO TRUSTEES OF THE HOTEL AND  
RESTAURANT EMPLOYEES ALLIANCE LOCAL UNION  
237 INSURANCE AND WELFARE TRUST FUND  
TRUSTEES OF THE HOTEL AND RESTAURANT  
EMPLOYEES ALLIANCE LOCAL UNION-237 PENSION  
TRUST FUND,

and

LOUIS SANFILIPPO, FRANK PRINCE, ROBERT KERN,  
RENALD ROSSA, JOSEPH CICARDINI, NORMAN  
*(Continued on Reverse)*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

HARRY ALAN SHERMAN  
1709 Blvd. of the Allies  
Pittsburgh, Pa. 15219  
412 471-7777

*Counsel for Respondents.*

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## OPINIONS BELOW

The Opinions of the United States Court  
of Appeals for the Third Circuit and of the  
United States District Court for the

### Opinions Below

Western District of Pennsylvania are as set out in the Appendix attached to the Petition.

### JURISDICTION

Jurisdiction herein is as set out in the Petition; and in addition thereto, as defined in Rule 19(b) of this Honorable Court.

### QUESTION PRESENTED

Where the Petition turns entirely on facts already resolved by the District Court and by affirmation of the Court of Appeals, in favor of Respondents; and where the Petition contains gross misstatements of facts and disregards record admissions and stipulations, so as to give color of right to review, should a Writ of Certiorari issue?

## COUNTER STATEMENT OF THE CASE

Because the first statement in the "Introduction" under Petitioners' Statement of the Case on page 6 of the Petition narrows the issues involved in the case, as did the District Court to one "essentially an action for breach of an employment contract"; and because of the misrepresentation that the District Court found "the transfer (of local trust funds) was proper and conducted in the interest of the beneficiaries of the Fund", Respondents have added by appendix hereto the factual review showing the basis of other issues ruled out of the case by the District Court on stipulation that the International Funds be construed as constructive trustees of the millions of dollars illegally transferred to them, as alleged in plaintiff's Further Amendment to the Complaint (J.A. Vol. I 384a)



## ARGUMENTS

### I.

THE PETITION CONTAINS GROSS MIS-  
STATEMENTS, MISREPRESENTATIONS,  
DISREGARD OF THE RECORD FACTS,  
AND TOTALLY INAPPOSITE CITATIONS

By their Pre-Trial Statement, (J.A. Vol. II, p. 1046a) under the heading ISSUES, defendant Petitioners represented to the learned Chief District Trial Judge below that "... the only issue presented in the instant litigation is whether the plaintiff, John Kenny, was improperly deprived of the position as director of the funds by the defendant trustees." On trial, however, without any motions to expand the pre-trial issue, a plethora of new issues were urged upon the trial judge by Gerald Schilian, Esq.; and the trial judge afforded defendants an opportunity to produce evidence supporting same.

Defendants-Petitioners had produced no proof whatever to support the jaundiced accusations of their trial attorney.

## Arguments

Having failed to support the charges leveled against the plaintiff by their attorney at trial, the defendants-petitioners, by their attorneys, irresponsibly misrepresent to this Honorable Court that such unfounded charges were in fact established of record below.

After almost 300 pages of testimony in the non-jury trial, at J.A. Vol IV 1826a, the following exchange redefines the "issues" in the case:

"THE COURT: All right. I understand that the issues in this case are, first of all, the validity of the contract in its inception.

MR. SHERMAN: I would not---

THE COURT: The equivalent of duress, coercion are factors that have entered this picture. I am not ruling now.

MR. SHERMAN: No, your Honor.

MR. SCHILIAN: And the violation of any fiduciary duty.

THE COURT: In the inception of the contract?

MR. SCHILIAN: That is right.

## Arguments

THE COURT: That goes to the validity, ab initio.

MR. SCHILIAN: Correct.

THE COURT: The second issue is in the termination if the court should find there was a valid contract in existence."

and at page 1828a:

"THE COURT: The Court will receive evidence and permit examination on the issue as to whether or not there was justification in terminating Mr. Kenny's contract, not with respect to the validity of mergers."

On both trial issues the District Court found for the plaintiff in the following language (App. to Petition, 7a, 8a):

"Although the defendants contend that Mr. Kenny was unwilling or unable to perform his duties as Director of the Trust Funds and that he was therefore terminated for just cause, the report of the study conducted by the William L. Meyers Co. does not establish that Mr. Kenny's performance was unsatisfactory.

## Arguments

Mr. Meyers further dispelled any such inference by his testimony that the recommended improvements could have been implemented under Mr. Kenny's administration.

That the court finds no evidence to support the contention that Mr. Kenny used improper means to secure the contract or that the compensation provided in exchange for his services was not reasonable."

Further, in the District Court's Conclusions of Law (App. to Petition, 8a) the following:

"The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. sec. 1001 et seq. Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract. The subsequent transfer of the Trust Funds does not cure the breach."

## Arguments

From page 8 of the Petition through page 24 thereof, under the captions "Facts" and "Reasons for Granting the Writ" counsel for the Petitioners have departed from all bounds of propriety by falsely asserting unsupported argumentation as record, proven facts. Oblivious to their responsibility as officers of the Court and of a Petitioner's burden to adhere to truthful references showing matters only which were established in and considered by the Trial Court, or which, proven or offered for proof were disregarded or improperly rejected by the Trial Court; *Landy v. Federal Deposit Insurance Corp.* C.A. N.J. 1973, 486 F2d 139, cert. den. 94 S. Ct. 1979, 416 U.S. 960, 40 L. Ed 2d 312; *Ries v. Lynskey*, C.A. Ill., 1971, 452 F2d 172; counsel for Petitioners have rather indulged in fictionalizing the Petition so as to scandalously present both the plaintiff and the Trial Court in a completely false light.

For the convenience of this Honorable Court in reviewing the compendious record for consideration of the charges so flagrantly made

## Arguments

in the Petition, Respondents, by their counsel respectfully and as briefly as possible will point out the most flagrant, false, distorted or misrepresented assertions in the Petition, together with references to the Joint Appendix (four volumes) lodged with the Court at 77-445 herein, by Respondents, as Petitioners for Certiorari as to damages only.

1. At page 8, the Petition states:

"From 1968 on, Kenny mentioned to other union officials that "he (Kenny) wanted to take over the Pension and Welfare Funds".

At J.A. Vol. III 1751a, defendant Sanfilippo, the only person to testify concerning discussion relating to Kenny "taking over the reins in the Welfare and Pension Fund" did not attribute any of such discussion to Kenny; in fact he referred to an officer Umberto Guidiotti, and at J.A. Vol. III 1752a, an employer trustee, Gurdon Flagg, involved in such discussions.

The distortion in the Petition, actually quoted as if lifted verbatim from the record,



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implies that Kenny intended to wrongfully "take over" the funds. Especially since Mr. Kenny died on June 28, 1977, prior to the docketing of either Petition for Certiorari in the within matter, it is perhaps significant that the late Hon. Wallace S. Gourley, Sen. Chief District Judge, who was assigned to most of the preliminary pre-trial matters in the case, at J.A. Vol. II 1006a, volunteered:

"THE COURT: Well, I don't know Mr. Kenny personally, but I know him by reputation. He is considered one of the outstanding labor leaders in this part of the United States."

2. Immediately following the "take over" distorted reference on page 8a, the Petition further asserts:

"Kenny had often suggested that someone send for a copy" (of a St. Louis fund director's contract)

Not a single word of testimony supports such misstatement. At J.A. Vol. III 1752a the defendant Sanfilippo specifically asserts

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that employer trustee Gurdon Flagg, in a meeting of the Trust Fund on July 13, 1971, made the suggestion to send for the St. Louis director's contract; and at the same meeting, a resolution was unanimously adopted offering Mr. Kenny the position as director of the pension and welfare funds, and a completed contract was read. (J.A. Vol. IV 2138a-2140a Minutes of Trustees Meeting). The McVey contract was not mailed until August 2, 1971 (J.A. Vol. III 1672a, 1.23).

3. At the top of page 9, the Petition states:

"The trustees made no offer regarding the terms of such employment and did not request that a written contract of employment be prepared. Nevertheless, at the insistence of the plaintiff, the Fund attorney, Herman Lipsitz, drafted a full employment contract...."

Withheld from this Honorable Court in the foregoing misstatement is the record fact the Herman Lipsitz, Esq. not only was a witness for the defendant Petitioners on

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the trial, but he actually was and is the senior member of the firm LIPSITZ, NASSAU, SCHWARTZ & EVANS in Pittsburgh, Penna. who represented the defendant-Petitioners in the entire proceedings in the District Court through trial. Prior to trial no such charge as implied in the printed accusation above was made anywhere on or in the record.

Said witness Lipsitz, at J.A. Vol. III 1676a testified as follows:

"Q. Did any of the trustees, at that time, ask you to prepare a written contract?

A. As I recall offhand, pursuant to this motion I was asked to have a contract prepared by the Board.

Q. By the Board?

A. Right."

Further, regarding the contents of the contract, the following from Mr. Lipsitz at J.A. 1682a-1683a:

"Q. You and Mr. Kenny discussed every part of it?

A. Yes.

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Q. And you had no discussion with any of the other trustees privately, concerning that document, before it was presented to them?

A. Privately, no, before the Board.

Q. Before it was presented to them on October 21, 1971?

A. Privately, no. We did explore all facets of the contract with the entire Board."

4. The misleading theme and implication that the defendant-Petitioners were toally unaware that a completed employment contract for Kenny was to be presented to them at the trustees' meeting on October 21, 1971 continues for the entire lower half of page 9 of the Petition. In fact, as appears of record at J.A. Vol. IV 2138a, 2139a, the Minutes of the Trustees' meeting of July 13, 1971 reports "A discussion" concerning the growth of the pension and welfare funds "so substantially over the past number of years .....that it appears necessary at this time

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that the Funds be directed by a person who has had complete and full knowledge of these funds and who is thoroughly versed in the operation of these matters; Mr. Flagg was of the opinion that since John Kenny was actually the originator and the main moving force in the creation of the Trust Funds and since he was primarily responsible for building the Funds to the point where they exist today that the most logical person to assume a job of this kind would be John Kenny. A motion was then made by Gurdon Flagg that if John Kenny so desires, he be given the option to act as Chairman of Trustees as well as Director of the Fund with the salary to be agreed upon at such time as a decision would be reached. This motion was seconded by Leo White and carried."

Leo White and Gurdon Flagg, at all times were employer trustees with extensive management and financial experience. Mr. White, a

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defendant-Petitioner, testified on trial (J.A. Vol. IV 1965a-1980a). Mr. Flagg, a defendant-Petitioner, was not called to testify. Defendant-Petitioner White, at J.A. Vol. IV. 1978a, ll. 21-25, and 1978a, ll. 1-10 corroborated the minutes. Not a single witness contested same; nor was any other proof to the contrary adduced.

5. At page 10 of the Petition reference is made to one Howard McVey who had formerly been a director of a union welfare trust fund in St. Louis. When called on trial by defendants' counsel, (J.A. Vol. III 1646a) plaintiff's counsel objected for the reason that no mention had been made in pre-trial procedure of the witness who was completely unknown to plaintiff's counsel. Over objection, he testified as to his personal employment under a contract which he later forwarded to Pittsburgh in August, 1971 following the July 13, 1971 resolution by the defendant-Petitioners trustees to employ



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Kenny. The last sentence on page 10, asserting: "Kenny's employment contract failed to establish standards of performance and attempted to emasculate the trustees by divesting them of supervisory authority over the Funds.", while conclusory argumentation, ignores the specific terms whereby the contract reserves to the trustees "the paramount authority.....as set forth under the terms of the Trust Agreements." Further, the same paragraph of the contract requires that under Kenny as director, the Funds had "to be operated in accordance with past practices." (J.A. Vol. I p. 21a, par. 2; also at App. pp. 48-55 in Petition filed at 77-445 herein)

6. In the first paragraph of page 11 of the Petition, the statement that: "The Fund job as performed by Kenny over the years required only a minimal effort and he did not intend to do any more upon assuming the Director's position" is totally unsupported in the record.

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7. Similarly, in the middle of page 10, the sordid statement that: "As a result of Kenny's actions, during the period May 1, 1973 through September 7, 1973, the Local 237 Funds were giving illegal financial support to Local 237 by paying the salary of its President" is not only totally false and without record evidence or proof whatever; but is contrary to the Pre-Trial Stipulation (J.A. Vol. II, 1177a-1180a, par. 23) showing that upon assuming the directorship of the Funds Kenny thereafter received no salary as President of the union. Nor is there any testimony or evidence of any "actions" by Kenny in the said period to warrant the misstatement.

8. On page 12, the Petition challenges the "findings of the District Court" as to the testimony of William L. Meyers (Pet. App. 8a), regarding "Kenny's administration of the funds". Because of the recklessness of the charge against the District Court it is deemed necessary to point out that:

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(a) at no place in Meyer's testimony did he place blame on Kenny personally for even the slightest criticism of procedures, methods or policies observed by him;

(b) Meyers did not at any time suggest that Kenny be terminated; (J.A. Vol. IV, 1931a)

(c) Meyers specifically testified that he found "no evidence or even a case of one cent not having been accounted for.." (J.A. Vol. IV, 1882a)

(d) Kenny cooperated with Meyers and delivered to him all books and records of the Funds; (J.A. Vol. IV, 1861a).

(e) Meyers found that: "The administrative people were conscientious..." (J.A. Vol. IV, 1875a) and that the staff "were doing very well under extremely unacceptable conditions.." (J.A. Vol. IV, 1887a); and that they "did a fine job under unacceptable conditions.." (J.A. Vol. IV, 1888a).

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(f) Meyers observed that: "They had a consultant firm on retainer at the time and they had a full administrative staff." He added: "I felt---and I don't know but what, to this day, it was true---if they had simply done what I had in the report, they could have accomplished it--The firm that they had as a consultant was and is nationally recognized." (J.A. Vol. IV, 1898a)

(g) Meyers didn't know who set up the system which he criticized in part; but he did not report to the international union that it was Kenny who did so. (J.A. Vol. IV 1927a-1928a)

The Meyers criticisms referred to on pages 12, 13, 14 and 15 of the Petition were not at all directed at Kenny personally, as therein implied.

9. Contrary to the speculation set out on page 12, subparagraph (a) that the funds "could have been earning higher interest." prior to the advent of Meyers, the evidence established, over the strenuous objections of counsel for defendant-Petitioner, (J.A.

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Vol. IV, 1817a-1841a) by Plaintiff's Exhibit 28 (J.A. Vol. III, 1410a-1416a) that "until the advent of Mr. Meyers we achieved a substantial amount of progress with respect to benefits in the form of welfare for our members and employees of the Employers.... Since the advent of Mr. Meyers we have secured not one single increase in any benefit; in fact, we are currently being put in a position to retrench promises we have made to the members concerning any increase in Pension Retirement Benefits..." and specific complaints regarding promises not kept by Meyers, investments bringing in less interest returns, excessive expenditures, "start-up costs", legal fees, unexplained "salaries", "Trustee reimbursements", "Administrative fees", "consulting fees", "Actuarial Fee" and failure in payment of claims, inter alia, as opposed to prior administration with Kenny as director, had quickly resulted.

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10. The most glaring and arrogant falsehood summarizing the foregoing misrepresentations is set out on page 15 of the Petition as follows: "As a result of Kenny's non-performance on behalf of the Funds, he was discharged and his salary discontinued at a meeting of the trustees of August 19, 1974."

Not only was Kenny never charged or notified of any nonperformance; he was not even notified of the reason for the trustees' intended suspension of his salary payments until Leonard Boreman, Esq., then representing Kenny had written to defendant Sanfilippo, chairman of the Board of local Trustees (J.A. Vol. IV, 2185a) demanding that the trustees desist from "systematically removing from the control and direction of Mr. Kenny" his duties and placing them "in other hands." In response to Mr. Boreman's letter, defendant-Petitioner's record counsel herein, Robert Mozer, Esq. replied, on August 20, 1974, (J.A. Vol. IV, 2186a) advising that: "The Trustees unanimously voted to forthwith



## Arguments

cease all payments of monies to John J. Kenny" without setting forth any reason therefor. The real reason, however, was that the trustees had already turned over all of Kenny's duties to Meyers, as all defendant-Petitioners had already admitted in their sworn answers to Plaintiff's Interrogatories.

Plaintiff's Interrogatory 24(c), (J.A. Vol. I, 70a) asked:

"24(c) Were any written obligations of the Trusts referred to in Interrogatories 2 and 3 not assumed by you? If so, state the manner in which you officially and formally rejected such obligations, giving grounds asserted by you for said rejections."

The answers by each and every defendant-Petitioner were:

"(c) The alleged contract with plaintiff Kenny was not assumed. He was removed as Chairman of the Board of Trustees on October 25, 1973; he was removed as Trustee on March 7, 1974. Any responsibility for Fund

## Arguments

administration was given to the William L. Meyers Co. on March 7, 1974. (Sanfilippo de. J.A. Vol. I 90a)

The remaining defendant-Petitioners refused to state that the Kenny contract was not assumed; and they added to the last sentence of their answer:

"On March 7, 1974 William L. Meyers Company was named Fund Administrator and Kenny, therefore, could have no responsibility for Fund administration."

(Dep. Prince, J.A. Vol. I 173a)

(Dep. Kern, J.A. Vol. I 180a)

(Dep. Rossa, J.A. Vol. I 187a)

(Dep. Cicardini, J.A. Vol. I 193a)

(Dep. Howard, J.A. Vol. I 199a-200a)

(Dep. Tatangelo, A.A. Vol I 206a-207a)

(Dep. Flass, J.A. Vol. I 214a)

(Dep. Blandi, J.A. Vol. I 221a)

(Dep. Settle, J.A. Vol. I 228a)

(Dep. White, J.A. Vol. I 235a)

(Dep. Dubaniewicz, J.A. Vol. I 243a)

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(Dep. Donadeo, J.A. Vol. I 249a)

(Dep. Keenan, J.A. Vol I 255a)

Moreover, plaintiff's Interrogatory 25(d) (J.A. Vol. I, 72a) pointedly asked:

"(d) During the existence of Local 237 Hotel and Restaurant Employees Alliance, or of the Hotel and Restaurant Employees Alliance Local 237 Insurance and Welfare Trust Fund and of the Hotel and Restaurant Employees Alliance Local 237 Pension Trust Fund, was any challenge made in writing to the lawfulness of the employment contract or the services of plaintiff in relation thereto?"

The unanimous sworn answers of every defendant-Petitioner was "No."

(Dep. Sanfilippo, J.A. Vol. I 90a)

(Dep. Prince, J.A. Vol. I 173a)

(Dep. Kern, J.A. Vol. I 181a)

(Dep. Rossa, J.A. Vol. I 187a)

(Dep. Cicardian, J.A. Vol. I 193a)

(Dep. Howard, J.A. Vol. I 200a)

(Dep. Tatangelo, J.A. Vol. I 207a)

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(Dep. Flagg, J.A. Vol. I 214a)

(Dep. Blandi, J.A. Vol. I 221a)

(Dep. Settle, J.A. Vol I 228a)

(Dep. White, J.A. Vol. I 236a)

(Dep. Dubaniewicz, J.A. Vol I 243a)

(Dep. Donadeo, J.A. Vol. I 249a)

(Dep. Keenan, J.A. Vol. I 255a)

11. On page 16, the black-faced heading which refers to "KENNY'S SELF DEALING.." is completely without basis in either the pleadings or the trial record, and is simply a scandalous jumping off point for the in-apposite citations relating to obligations of fiduciaries. No evidence whatever warrants even by inference or implication that Kenny ever did a single act which was for his own interest while in the position of Director of the Trust Funds.

12. The unwarranted slurs via arguments set out on pages 18, 19 and 20, are all without the slightest evidential support, especially since the Pre-Trial Stipulation (J.A. Vol. II, 1177a, 1179a, 1180a) clearly

## Arguments

shows that the employment contract was first offered to Kenny in July, 1971, that a formal contract was not only presented to him by the Board of Trustees on October 21, 1971, but all of the trustees signed same; and still Kenny did not accept same. Further, even after the unanimous Resolution of the trustees on June 14, 1972 permitting Kenny to select his own hours of work as Director he did not yet take the job; and that only after the International Union President approved the contract, Kenny undertook to begin his employment as of May 1, 1973.

In spite of the record, the Petition continues to argue that Kenny aggressively sought, pursued and finally wrote himself his contract.

13. Petitioners' second asserted reason for allowance of the writ, set out at the top of page 19 of the Petition is obviously an attempt to bring the matter within Rule 19(b) on alleged conflict between Circuits. It is not pointed out in said section wherein

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the District Court or Circuit Court of Appeals did decide any rule or principle of law in conflict with any of the citations therein. Actually, the entire argument is based on the failure of the lower courts to decide facts in favor of the Petitioners, so as to make applicable their citations.

In an appropriate case, as where the record amply demonstrates that a trial court has no evidence or record support for its findings of facts upon which adjudication and judgment have been premised, and a Court of Appeals permits such judgment to stand, this Honorable Court may and probably will grant certiorari; especially where an important, broad reaching public question is involved. Where, as herein, it is nowhere in the Petition shown that the District Court's Findings of Fact lacked record support, or that it improperly rejected proffered proof which may have resulted in contrary findings, and especially where those Findings have been reviewed and affirmed by the United



## Argument

States Court of Appeals, it is respectfully submitted that the specious second "reason" for allowance of the writ should be disregarded; *Hallmark Industries v. Reynolds Metals Co.*, 94 S. Ct. 2643; *United States v. Johnson*, 268 U.S. 220, 227.

This Honorable Court is certainly aware that the Employee Retirement Income Security Act became effective on December 31, 1974, (29 U.S.C. 1001 et seq.); and it is stipulated that Kenny's salary payments were terminated as of August 31, 1974 (J.A. Vol II 1181a); therefore no factual evidence of violations of ERISA were asserted or assertable in the original Complaint in this case. The Further Amended Complaint, filed in the District Court on May 1, 1975 (J.A. Vol. I, 309a-313a) certainly charges violations by the International Union Pension and Welfare Trust Funds under ERISA. The Further Amended Complaint specifically avers then current intention of those Funds, through Meyers, of illegally obtaining transfer of the several

## Arguments

millions of dollars in the Pittsburgh Trust Funds, to the international defendant-Petitioners. The ERISA issues thus raised below were not heard, counsel for defendant-Petitioners stipulating with the District Court that his international defendants were to be treated by the District Court as constructive trustees of the Pittsburgh funds for the purpose of the case. (J.A. Vol. IV, 1825a, 11. 21-25, 1826a 1. 1)

The Petition, however, attempts to make it appear that the defendant-Petitioners were charging Kenny with violations of ERISA. Neither the Petition for Removal to the District Court (J.A. Vol. I, 11a); nor the defendant-Petitioners' Amended Answer (J.A. Vol. I, 32a); nor even their Answer to plaintiff's Further Amedentment to the Complaint (J.A. Vol. I, 384a) assert any matter which violated ERISA. Nor, indeed was a word of evidence presented or offered by the defendant-Petitioners which would have constituted such violation. The District

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Court's second Conclusion of Law (Pet. App. 8a) that the employment contract "... violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. 1001 et seq." is the only conclusion possible upon the record. Nor did the District Court assert any "standard of behavior" required by ERISA which could be reviewed herein as suggested on page 21 of the Petition, concluding the second "reason" for allowance of the writ.

14. The brazen assertion at page 23 of the Petition, beginning the fourth "reason" for allowance of the writ, that: "The District Court found the transfer was proper and conducted in the interest of the beneficiaries of the Fund" is a gross distortion of the record. The issue of illegality in the transfer was not before the District Court by its own trial ruling upon the strenuous insistence of counsel for defendant-Petitioners and despite the offer of proof by plaintiff's counsel (J.A. Vol. IV, 1817a-1824a); the

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District Court at 1824a ruling at lines 13, 14 that the transfer of funds "is a non-issue in this case by virtue of the stipulation."; to which ruling counsel for defendant-Petitioners stated: "Right".

The only conscionable view of the District Court's observation that: "There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence required by statute" is that it referred to the ruling that kept such evidence out of the trial.

## II.

THE LIABILITY OF THE INTERNATIONAL  
FUNDS FOR ANY JUDGMENT OF THE COURT  
AGAINST THE LOCAL UNION TRUSTEES WAS  
STIPULATED BY COUNSEL FOR SAID  
INTERNATIONAL FUNDS

The fourth "reason" for allowance of the

## Arguments

writ, at page 23 of the Petition completely disregards the record stipulation of the trial attorney for the defendant-Petitioners, relied upon by the District Court in making the international funds constructive trustees, as previously pointed out herein. The record is very clear that:

(a) the employment contract of Kenny as Director of Local Union 237 pension and welfare trust funds was effected by the individually named persons who constituted the local management-employee participant members' boards of trustees, as named and identified in the Complaint, the Amended Complaint and in the Further Amended Complaint.

(b) Local 237 had, in March, 1974, been merged by the international union with Local 188 of the Bartenders Union to form Local Union 57. The same trustees of the former local 237 continued under new Declarations of Trust for said Local 57. (J.A. Vol. II, Pre-trial stipulation 1177a par. 5). The Local 57 trusts were pursuant to Declarations

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dated March 7, 1974. (J.A. Vol IV, 2105a)

(c) Kenny had been serving as Director of the Trust Funds since May 1, 1973, and continued to do so after the merger of March 7, 1974, until August 31, 1974, at which time his salary was terminated without explanation, charges, hearing or warning. (J.A. Vol. II, Stipulation, 1180a, par. 24)

(d) Suit was commenced in the within matter on December 9, 1974 in the Allegheny County Court of Common Pleas of Pennsylvania, and on January 8, 1975 removed to the District Court by defendant-Petitioners. (J.A. Vol. I, Docket Entries 2a)

(e) The international funds were, upon motions of counsel for plaintiff below and Orders of Court allowing said amendments, joined on October 22, 1975 and November 5, 1975 respectively (J.A. Vol. I, Docket entries, 5a)

(f) Effective January 28, 1975, by writing referred to as Merger Agreement, the Local



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57 trusts were transferred to the international funds. (J.A. Vol. IV 2134a, 2136a) and all trustees named as individual defendants in the complaints resigned. (par. 4 therein)

(g) Upon discovery of the transfer of about \$9,000,000.00 of the Local 57 trust funds and the resignation of all local trustees, without notice to plaintiff below, or to his counsel, the amendments to join the international funds as defendants below were presented and allowed.

(h) Defendant-Petitioners' counsel, urging suppression of the issues as to the illegality of the absorption of the millions of dollars of local trust funds into the international "funds" while the case was pending below, without notice to the member participants, the District Court or to counsel for plaintiff below, readily agreed that the international funds would pay any judgment rendered against the resigned local trustees. In the defendant-Petitioners' Pre-trial Narrative Summary (J.A. Vol. II, at 1047a) it was stated:

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"Defendants have already offered in open court to stipulate that the International Funds, being the recipients of the assets of the Funds formerly held under the trust funds formerly controlled by the defendant trustees, that, therefore, the account of the Western Pennsylvania Fund Unit of the International Funds would be liable for any damage award which the Court may deem just and proper."

Further, at J.A. Vol. III, 1626a, at the start of the defense at the non-jury trial, the following:

"THE COURT: Before you being presenting your evidence, Mr. Schilian, I understand it has been agreed by---

MR. SCHILIAN: May we approach the bench, Your Honor?

"THE COURT: You may.

(The following proceedings were held at side bar:)

"THE COURT: It was agreed by the trustees of the fund, that if there is a judgment in this case in favor of the plaintiff, the fund---

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MR. SCHILIAN: The International Fund.

THE COURT: The International Fund will assume responsibility for payment of such judgment or obligation.

MR. SCHILIAN: That is in the event---

MR. SHERMAN: They are parties by further amendment, Your Honor.

THE COURT: All right.

With that stipulation, you may proceed, Mr. Schilian.

MR. SCHILIAN: All right. We have agreed that the International Fund will be responsible--well, the Western Pennsylvania Unit of the International Fund will be responsible for any financial award the Court may make and, on that basis, it is understood that we have stipulated to the validity of the merger of the local Western Pennsylvania Fund into the International Fund.

MR. SHERMAN: The fact of merger, not the validity. I am not raising any question, but I can't stipulate to the validity.

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THE COURT: For the purpose of these proceedings, it is a non-issue.

MR. SHERMAN: Yes.

MR. SCHILIAN: Will plaintiff also stipulate that the question of the merger of 237 and 188 are non-issues?

MR. SHERMAN: Absolutely. We just so stipulated.

MR. SCHILIAN: Okay, fine. Thank you.

THE COURT: So we need have no testimony or evidence concerning the transfer of funds.

MR. SCHILIAN: Right. Okay, thank you, Your Honor.

Further, at J.A. Vol. 1824a, the following:

THE COURT: So we don't get into any unnecessary detail with respect to this, it is my understanding that counsel's stipulation is that it is not necessary to trace these assets of what was originally the local funds for the purpose of impressing a constructive trust--for instance, it is not necessary to go through transfers in order to establish liability on the part of the

## Arguments

fund. This was the sum and substance. It is a non-issue in this case by virtue of the stipuation."

And finally at 1825a, 1826a:

"THE COURT: The legality of merger of funds, transfer of funds or anything else, is not an issue in this case, by virtue of a stipulation to the effect that the natural consequences of a constructive trust would be honored. Is this correct?

MR. SCHILIAN: That is my understanding."

In view of the foregoing, the latest effort as set out in "reason" IV of the Petition is an offer to start all over again in spite of the stipulations of counsel for defendant-Petitioners, and is hardly appropriate for review by certiorari in the Supreme Court.

## III.

RESPONDENTS ARE PETITIONERS  
FOR WRIT OF CERTIORARI AS TO  
DAMAGES ONLY AT 77-445 HEREIN

It is respectfully pointed out that while

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Respondents in the within Petition sincerely urge that the Petition has not a scintilla of merit, and that it does not assert grounds for invoking the good offices and sparse time of this Honorable Court and its busy and capable staff, nevertheless, the partial but substantial issue as to damages awarded by the District Court is based upon clear error of the learned District Court; and that as a result of such error, no damages were awarded for the second five-year term of the contract, contrary to the long-established principles and decisions of this Honorable Court and of decisions of other Courts of Appeal and of the Supreme Court of Pennsylvania, as set forth in said Petition at 77-445, which was docketed September 20, 1977, the day before the docketing of the within Petition.



## CONCLUSION

The Petition misstates, distorts, misrepresents and disregards record facts, prior stipulations and procedural agreements with the District Court, in fashioning a basis for review, as set out herein. In sum, Petitioners seek review herein of fact-findings of the District Court, affirmed by the Court of Appeals, and which fact findings are amply supported by the record below, with the exception, not here involved, that the District Court erred as a matter of law in regard to the award of insufficient damages, as the Petition for Certiorari filed by Respondents at 77-445 herein shows.

The Petition fails to show any error in law or conflict with any pertinent decisions of other Circuits which require reconciliation herein.

No conduct of Respondents' Decedent, plaintiff below, was shown to be in violation of the Employee Retirement Income Security Act of 1974; and no standard for fiduciary

### Conclusion

behavior under said act was declared by the courts below so as to require or invite review by certiorari herein.

WHEREFORE it is respectfully suggested that this Honorable Court deny the Petition requesting issuance of the Writ of Certiorari in the within matter.

Respectfully submitted,

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412 4717777  
Counsel for Respondents

## APPENDIX

1a

### COUNTER-HISTORY FROM RECORD

The Plaintiff, prior to his resignation from the elected post on September 7, 1973, had been the President of Local 237 of the Hotel and Restaurant Employees Alliance for thirty-seven (37) years. Since about 1938, when Plaintiff first negotiated the establishment of welfare and thereafter pension funds for the members whose employers made contributions pursuant to labor-relations contracts, the Plaintiff, in addition, served as chairman of the two funds, in accordance with the requirements of the Declarations of Trusts, as amended from time to time through 1972. The Plaintiff had not received salary from the trusts, but was paid by Local 237 as president. By 1971 the two trusts had grown to about Nine Million (\$9,000,000.00) Dollars, and the trustees adopted resolutions and amendments authorizing employment of a single director over both funds. The minutes of the Trusts reflect consideration of the position to be called "Chairman-Director" prior to the meeting of October 21, 1971; however, on the latter date formal, unanimous vote of the trustees of both Funds offered the position to Plaintiff, and a copy of the proffered contract was read into the minutes; (Vol. I Jt. App. p. 272a-281a). The motion to adopt was made by Gordon Flagg, an employer-trustee, and seconded by Louis Sanfilippo, a union-trustee (Defendant herein and now President of Local 57 which in 1974 absorbed the former Local 237). The Plaintiff was unwilling to accept his newly offered post without giving the matter extended consideration, and asked the Union and Trust

**Counter-history from record**

Funds' lawyer, Herman Lipsitz, to review the legality of his holding the presidency of Local 237 at the same time as the directorship of the Funds. Since Paragraph 5 of the proffered contract (Vol. I Jt. App. p. 521a) required that Plaintiff devote "full time" to the directorship, he declined to accept same, preferring to continue in his office as President of Local 237. By Resolutions adopted by the trustees unanimously on June 14, 1972, an amendment to the proffered contract eliminated the requirement that Plaintiff devote full time to the directorship, so that he could continue as President of the Local Union (Vol. I Jt. App. p. 290a-523a). At this time, the Plaintiff and Attorney Lipsitz at the Plaintiff's insistence, inquired of the then International Union President Ed. S. Miller whether the office of president would present any conflict of interest with that of director of the Trusts. Eventually, by letter dated March 2, 1973, the Plaintiff wrote to General President Miller offering to act as Local Union President without salary if necessary to assume the position as Director of the Trusts; and he first received a reply dated March 8, 1973 stating that "... it would not be in the best interests of Local 237" for Plaintiff "to remain as a non-salaried President of Local 237 while employed as a Director ..." of the Trusts. Upon further consideration, on April 26, 1973, General President Miller wrote to the Plaintiff that he had reviewed the matter with the International Union's General Counsel, and that, subject to the provisions set out in said letter (Kenny Ex.) (Vol. IV Jt. App. p. 2183a). Plaintiff's suggestion of remaining as a non-salaried President of the Local Union was approved, so as to clear the way for Plaintiff's acceptance of the position of Director of the two Trust Funds. By his letter and signature of May 1, 1973, Plaintiff accepted the con-

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tract of employment; however, he still requested that Mr. Lipsitz research the law and federal agencies to determine if any ethical or legal conflict could exist. By letter of August 21, 1973, Plaintiff was assured by Mr. Lipsitz that a thorough research of the federal laws and inquiry of the United States Department of Labor was completed and that "... there exists no conflict of interest." (Kenny Ex.) (Vol. IV Jt. App. p. 2181a). The Plaintiff continued to act as Director of the Funds.

The following aspect of the case was ruled to be irrelevant and therefore not admissible on trial, as not bearing on the right of the plaintiff under his employment contract; however, only by ignoring the record establishing same under such ruling (Test., App. Vol. IV, p. 1821a) could the learned Chief District Judge find: "There is no evidence that the transfer of the funds was made for any purpose other than to discharge the fiduciary duty of the trustees to administer the Trust Funds in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence required by statute." Since counsel for *Petitioners* insisted that the discovery depositions be incorporated in the Joint Appendix, it appears that the following summary of such proof of the assertions made in plaintiff's answer to the affirmative defenses asserted as reason for the unilateral termination of plaintiff's employment be here set forth:

Between May 1, 1973 and September 7, 1973, these pertinent events occurred: International General President Miller was succeeded by Edward Hanley; and the latter, through his "administrative assistant" Anselmo, International Organizer Cicardini (Defendant) and Hanley's friend, William L. Meyers, of Naperville, Illi-



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nois, and former Trustee of a Chicago Local Union Trust, set forth on an intense, and not always overt, plan to obtain possession of the millions of dollars in the Local 237 Pension and Welfare Funds then under Directorship and protection of the Plaintiff. In the latter half of 1973 (in fact not until December, 1974) the International Union, its officers and agents, had absolutely no legal, constitutional or contract right to in any way interfere with the administration of the Local 237 Trusts; however, Hanley, Anselmo and Meyers apparently determined to remove Plaintiff as a practical obstacle to their plan, by first attempting to intimidate him on threats of "charges", which threats being ineffectual, by circumventing him and conspiring with his successor as (appointed) President of Local 237, Sanfilippo. Meyers was sent into Pittsburgh by Hanley to "investigate" the Local 237 Trusts for irregularities. Rather than resist, Plaintiff joined the other Trustees in inviting him to do so. His report titled "An Examination of the Hotel and Restaurant Employees Local 237 Insurance and Welfare Trust Fund and Pension Fund" (Meyers Dep. Ex. 1) at pages 42, 61 and 66 noted with displeasure that the Trust Declarations required that the Chairman of both trusts be the elected President of Local 237; that the Declaration required that the Funds be located in Local 237 offices; and although he found that: "The Staff, though lacking adequate supervision, perform well . . ." and that . . . "claims experience appears well within the criteria anticipated by the actuary" (p. 108), Meyers recommended that the provision of Article VII, Section 12, of the Local Declarations of Trusts requiring that the Trust Fund offices be located in Local 237's offices be eliminated by amendment (p. 112) and further recommended that "investment



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counsel should be retained" (p. 114). Of course, Meyers had already been selected as such "investment counsel" by the International. Further, nationally prominent Martin Segal Co., the largest pension and welfare trust counsellors in the United States, had, from the beginning of the Local 237 Trusts been engaged by the trustees; but the Segal days were numbered, since apparently that company could not be relied on for effectuation of the Hanley-Anselmo-Cicardini scheme to obtain possession of Local 237 Trust Funds.

Announcing to the trustee meeting of October 25, 1973 that "... the International Union has indicated that it is illegal to have a designated Chairman as our present Agreement and Declaration of Trusts reads ... " Local 237 President Sanfilippo ordered the Plaintiff removed from the Chairmanship, and called for a motion to amend the Trust Declarations to confer upon the trustees the sole power to elect the trust officers (Minutes of Pension and Welfare Trusts of October 25, 1973) (Vol. IV Jt. App. p 2152a). What the Minutes do not disclose, however, is that Hanley, Anselmo and Cicardini had in advance secretly met with Sanfilippo and others to decide upon the action of the trustees (Sanfilippo Dep. pp. 45, 46, 47) (Vol. II Jt. App. p. 803a-806a). With the resignation of Plaintiff as President of Local 237, the Local was ordered ("dictated", Sanfilippo Dep. p. 20) (Vol. II Jt. App. p. 769a) by the International Union to be merged with financially defunct Local 188, Bartenders' Union, into Local 57, thereby obviously diluting Plaintiff's personal influence in the Local. Immediately upon the accomplishment of the "merger" of the two local unions, done without notice to or vote of the membership, and completely without constitutional provision therefor, the Local 237 Welfare Trust and the

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Pension Trust were "transferred" to the newly formed Western Pennsylvania Hotel, Club, Motel and Restaurant Employees' Trusts on March 7, 1974, under a Declaration eliminating the requirement that the local member-participant union appoint the union trustees thereunder (setting the stage for actual transfer of ownership of the Funds to the International-controlled Welfare and Pension Funds). The Plaintiff was misled into believing that the maneuver of the merger and transfer were in effect only changes of names, and that, with himself continuing to act as Director of the Funds, the participants therein would continue to have their legal and equitable interests protected. The temporary retention of the Plaintiff in his contract position, however, was a ploy, as the International officers, and their agent Meyers, were already setting up the International Funds and directing their plans for obtaining "transfer" of the Local Trust Funds thereto, all without notice to the Plaintiff, and completely without the knowledge of the participant owner-members in the funds.

The International Welfare Fund was set up at the suggestion of William Meyers, Defendant (as was the International Pension Fund), according to Meyers' testimony (his Dep. pp. 31, 32) (Vol. II Jt. App. p. 693a). Meyers stated that the International Welfare Fund was set up about May, 1974, and the Pension Fund in the fall of 1974, but prior to the December, 1974 Special Convention of the International Union at San Francisco, California, where Article XXII was allegedly adopted as set forth in the Exhibit attached to the Affidavit of Gerald Schilian, Esq., paragraph 7, (Vol. I Jt. App. p. 319a) supporting his motion to strike the Further Amendment to the Complaint. The sequence of events, namely,

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Meyers' suggestion for establishment of the Funds, their being set up prior to any Constitutional power for so doing, and the implementation of the suggestion by call of a "Special Convention" in San Francisco for the adoption of the amendment demonstrates the influence of Meyers on the actions of President Hanley of the International Union; and the control over such Funds is exercised by President Hanley (with, of course, "the approval of the General Executive Board"); however, such "control" is delegated to Defendant Meyers by contract (Meyers Dep. p. 36) (Vol. II Jt. App. p. 698a). Meyers and Hanley are friends of at least ten (10) years duration and worked together prior to Hanley's appointment to the presidency of the International Union. The Trustees of the International Welfare Fund appointed by President Hanley are: Lou Cohen, Esquire, New York; Anthony Rey, an alleged hotel manager of Atlantic City; and two union members, Frank Preiss of New York and Frank Gerace of Atlantic City (Meyers Dep. p. 25) (Vol. II Jt. App. p. 687a); (Pilkenton Dep. p. 14) (Vol. II Jt. App. p. 1063a). The Trustees of the International Pension Fund, appointed by President Hanley are: Lou Cohen, Esquire, New York; Paul McCastland, union member, Florida; Dominic Luongo, and Frederick, of California, and Albert O'Neill (Meyers Dep. pp. 30-31) (Vol. II Jt. App. p. 692a); (Pilkenton Dep. p. 14) (Vol. II Jt. App. p. 1063a). No trustee is named by either the employer contributors or the local union member-participants.

Having cut off the Plaintiff from any information as to the proceedings under the direction of Meyers and the International's "organizer" Cicardini, Sanfilippo and White, the latter two Western Pennsylvania Trustees

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readily cooperating with the International officers, and their man Meyers, moved quickly to eliminate the Trustees locally from any control over the Trust Funds, and prepared or mandated the resignations of all Local Trustees on April 1, 1975, simultaneously convincing them that they had "transferred ownership" in both Trust Funds to the International Welfare and Pension Funds. The letters directing the transfer of assets of the funds in the Mellon, Pittsburgh National and Equibank depositories, directed by Meyers, and undoubtedly prepared by him or at his direction, signed by Sanfilippo and White, Defendants, and dated April 17, 1975, (over two weeks after resignation of all the Trustees, and without any Resolution of the Trustees authorizing the two to execute same) named the transferee as "Escrow Account 453, Bank of Naperville, Naperville, Illinois." When asked on his deposition concerning said Escrow Account's ownership, Sanfilippo denied that he had signed such a transfer, and had no knowledge of the account or its owner (Sanfilippo Dep. pp. 115-120) (Vol. II Jt. App. p. 864a-869a). White offered the false testimony that the Escrow Account was owned by the Western Pennsylvania Trusts (White Dep. P. 54) (Vol. I Jt. App. p. 592a), until his counsel Schilian shouted a "stipulated" denial of his testimony into the record. Meyers, more surprisingly, testified that he knew nothing of the account, and that neither he nor his corporation "owned" or set up same (Meyers Dep. pp. 74-75) (Vol. II Jt. App. p. 736a-737a). Meyers lives in Naperville, Illinois, and has his personal accounts at the Naperville Bank, as does his wife. It was only by taking the deposition of the vice-president of the Naperville Bank, Pilkenton, under subpoena duces tecum, and under searching cross-examination, that it was disclosed that

no Escrow Account 453 actually exists; however, notes of a telephone discussion of April 15, 1975, on a yellow, lined legal-type note pad, showed that Meyers had personally "reserved" the number for an anticipated escrow account in his own name.

Since September, 1974, payment to the Plaintiff under his written contract ceased, without stated reason and Plaintiff was no longer informed as to meetings of the Trustees but has at all times been ready and able to carry out his duties as Director.

The foregoing extensive statement is necessitated by the evasive and misleading Answer and Amended Answer to the Complaint, as was shown in summary in paragraph 7 of the Affidavit of Harry Alan Sherman opposing the Motions of the Defendants to strike the Further Amendment to the Complaint Joining Meyers and the International Welfare Trust Fund as Defendants (Vol I Jt. App. p. 333a). The Amended Answer, in addition to the general denials and simple counterclaim set forth in the original Answer, adds counts as affirmative unsupportable defenses attempting to justify "termination" of the contract sued upon. Plaintiff's Answer to such baseless defenses was filed, and the depositions of Sanfilippo, White, Meyers, the trust representatives of the three major Pittsburgh banks and Vice-President Pilkenton of the Bank of Naperville have demonstrably supported Plaintiff's assertions in both his Further Amendment to the Complaint and his Answer to the baseless affirmative defenses aforesaid.

The defendants' Pre-Trial Statement (Joint App. Vol. II p. 1042a) under the caption "ISSUES", declares:



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"Notwithstanding the plaintiff's unabashed attempt to confuse the question to be decided by the Court, the only issue presented in the instant litigation is whether the plaintiff, John Kenny, was improperly deprived of the position as director of the Funds by the defendant trustees."

\* \* \* \* \*

"Defendants have already offered in open court to stipulate that the International Funds, being the recipients of the assets of the Funds formerly held under the trust funds formerly controlled by the defendants trustees, that, therefore, the account of the Western Pennsylvania Fund unit of the International Funds would be liable for any damage award which the Court may deem just and proper."

The learned Chief District Judge has found that the defendants-appellants failed to establish any ground for terminating plaintiff's contract, that "The contract of employment providing compensation to Mr. Kenny for his services as Director of the Funds violated neither the terms of the trust agreement nor the provisions of 29 U.S.C.A. 1001 et seq. Nor does the evidence disclose just cause for the discontinuance of Mr. Kenny's salary or for the unilateral rescission of his employment contract."

The learned Trial Judge further concluded: "In view of Mr. Kenny's limited formal education (four years elementary school), his 73 years of age, and the fact that he has sustained two severe heart attacks in recent years, (Tr. 97-100), it is not likely that he would find employment elsewhere. It is therefore concluded that, as to the first five year period of the contract, Mr.



Kenny may recover \$128,290.30. The above considerations, in addition to those contained in Mr. Kenny's motion for advancement of the trial date, lead this court to conclude that it is not probable that Mr. Kenny would have exercised his option to renew the contract for an additional five-year term."

Defendants-Appellants then appealed from the final judgment entered pursuant to the Findings and Conclusions of the District Court.

Plaintiff-Cross-Appellant also appealed from the District Court's disallowance of the damages for the unexpired second five year term. Plaintiff actually had exercised his option for renewal for said term on record. The Circuit Court of Appeals affirmed.

No medical evidence was introduced to support a finding concerning plaintiff's incapacity to continue to perform his duties as director of the funds for the entire ten year term.

Plaintiff's claim has at all times been for the damages resulting to him for the full unexpired ten-year contract term, which includes the second five year period for which he exercised his option as appears from the following pleadings:

THE Petition for Removal

THE ANSWER AND COUNTERCLAIM

THE AMENDED ANSWER

PLAINTIFF'S REPLY TO COUNTERCLAIM AND AFFIRMATIVE  
AVERMENTS OF DEFENDANTS' AMENDED ANSWER

THE AMENDED COMPLAINT  
MOTION FOR LEAVE TO FURTHER AMEND THE COMPLAINT,  
JOINING THE INTERNATIONAL FUNDS AND ORDER

GRANTING SUCH LEAVE  
DEFENDANTS' ANSWER TO PLAINTIFF'S  
FURTHER AMENDED COMPLAINT